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Merging Comparative Fault with Strict Liability Actions in North Dakota: In Search of a New Day

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MERGING COMPARATIVE FAULT WITH STRICT LIABILITY ACTIONS IN NORTH DAKOTA: IN SEARCH OF A NEW DAY

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I. INTRODUCTION

In the not too distant past, legal theorists were waging a fierce war on the subject of comparative fault.[1] The battleground was the American tort system and attorneys for plaintiffs and defendants were vying for the spoils. It is clear from an examination of the case law and statutes across the country that a true winner has finally emerged in the dispute. After receiving a less than warm reception in the 1960's,[2] forty-three states currently adhere to some form of comparative fault in negligence cases.[3] Thus, not only is it safe to

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1. The term "comparative fault" is being used in an effort to avoid the confusing semantic difficulties which result when such terms as "comparative negligence," "comparative causation," and "comparative responsibility" are used interchangeably. However, the term "comparative negligence" will be used when referring to state statutes that deal with this concept in negligence actions.

2. Until 1969 only seven states had adopted comparative negligence principles: Arkansas (ARK. STAT. ANN. §§ 27-1763 to -1765 (1979)); Georgia (GA. CODE ANN. § 105-603 (1984)); Maine (ME. REV. STAT. ANN. tit. 14, § 156 (1980)); Mississippi (MISS. CODE ANN. § 11-7-15 (1972)); Nebraska (NEB. REV. STAT. § 25-1151 (1979)); South Dakota (S.D. CODIFIED LAWS ANN. § 20-9-2 (1979)); Wisconsin (WIS. STAT. ANN. § 895.045 (1983)). *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

3. *See* Appendix, *infra*.

say that the protagonists of comparative fault have won the war, but also that this concept has become a staple of the American Civil Justice system.[4]

Before the dust has had a chance to settle on the comparative fault war, another conflict is being waged involving identical combatants. The subject of this new battle is whether to introduce comparative fault principles into strict liability actions.[5] Much rhetoric has been bandied back and forth between the two sides, but the substantive arguments have fallen neatly into place. On the one hand, opponents of the comparative fault and strict liability merger cite the so-called "apples and oranges" theory,[6] which states that since strict liability is not predicated on negligence or fault, it is illogical to use plaintiff's conduct to lessen the liability of the defendant.[7] On the other hand, supporters of this merger assert that the distinction between strict liability cases and negligence actions is simply a semantic game and that the true issue in these cases is fault, regardless of the plaintiff's theory of recovery.[8] Consequently, these advocates find it completely consistent to decrease a defendant's liability in a products liability case by the amount of fault attributable to the plaintiff.

Although the debate on this new aspect of the comparative fault war is far from over, certain conclusions have already been drawn. To date, the "pro-merger" forces have gotten the best of the fracas. The high courts of thirteen states have extended comparative fault principles to strict liability actions.[9] Further, five

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4. *See* Appendix, *infra*.

5. *See* Fischer, *Products Liability — Applicability of Comparative Negligence*, 43 MO. L. REV. 431 (1978); Twerski, *From Defect to Cause to Comparative Fault — Rethinking Some Product Liability Concepts*, 60 MARQUETTE L. REV. 297 (1977).

6. *See* Twerski, *supra* note 5.

7. Kinard v. Coats Co., Inc., 37 Colo. App. 555, ____, 553 P.2d 835, 837 (1976). The court stated as follows:

> Products liability under § 402A does not rest upon negligence principles, but rather is premised on the concept of enterprise liability for casting a defective product into the stream of commerce. . . . Thus, the focus is upon the nature of the product, and the consumer's reasonable expectations with regard to that product, rather than on the conduct either of the manufacturer or of the person injured because of the product.

Id. See also Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974); Seay v. Chrysler Corp., 93 Wash. 2d 319, 609 P.2d 1382 (1980).

8. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Pinto, *Comparative Responsibility — An Idea Whose Time Has Come*, 45 INS. COUNSEL J. 115, 115 (1978).

9. Those states which have merged strict liability with comparative fault are Alaska (Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976)); California (Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr., 380 (1978)); Florida (West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976)); Illinois (Coney v. J.L.G. Indus., Inc., 97 Ill.2d 104, 454 N.E.2d 197 (1983)); Kansas (Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980)); Minnesota (Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977)); New Hampshire (Reid v. Spadone Mach. Co., 119 N.H. 457, 404 A.2d 1094 (1979)); New Jersey (Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979)); North Dakota (Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984)); Oregon (Wilson v. B.F. Goodrich, 292 Or. 626, 642

other jurisdictions have effected the merger by statute,[10] and the federal courts have interpreted the laws of three more states as providing for a marriage of the doctrines.[11] This is not to assert that a total victory has been achieved by the proponents of the extension of comparative fault,[12] but the clear trend in jurisdictions that have considered this question is to merge comparative concepts into strict liability cases.[13]

Recently, a collateral issue has appeared in the comparative fault merger battle. This issue is whether the judiciary should be obligated to abide by the principles of any existing comparative fault statutes in the respective states if the courts continue to join comparative fault with strict liability. This dilemma could not be better illustrated than in two recent North Dakota Supreme Court cases, *Day v. General Motors Corp.*,[14] and *Mauch v. Manufacturers Sales and Service, Inc.*[15] These companion decisions stand for the proposition that North Dakota will adhere to the pure form of comparative fault in strict liability actions.[16] These decisions directly conflict with the public policy behind the existing North Dakota statute[17] which calls for a modified form of comparative

P.2d 644 (1982)); Texas (General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977) *overruled*, Duncan v. Cessna Aircraft Co., 665 S.W.2d 428 (Tex. 1984)); Utah (Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981)); Wisconsin (Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967)).

10. Those states which have effected the merger of strict liability with comparative fault by statute are Arkansas (ARK. STAT. ANN. §§ 27-1763 to -1765 (1979)); Maine (ME. REV. STAT. ANN. tit. 14, § 156 (1980)); Michigan (MICH. COMP. LAWS ANN. § 600.2949 (West Supp. 1985)); New York (N.Y. CIV. PRAC. LAWS § 1411 (McKinney 1976)); Washington (WASH. REV. CODE ANN. §§ 4.22.05 and 4.22.015 (Supp. 1985)). *See also* MINN. STAT. ANN. § 604.01 (West Supp. 1984). Section 604.01 is a codification of the Minnesota Supreme Court's decision in Busch v. Busch Constr., Inc. *See* Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977).

11. The federal courts of three jurisdictions have predicted that, given the question of whether to combine strict liability with comparative fault, the high courts of these states would construct the merger. Those cases are Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Edwards v. Sears Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) (Miss.); Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980).

12. States which have refused to conduct a merger of strict liability with comparative fault are Colorado (Kinard v. Coats Co., Inc., 37 Colo. App. 555, 553 P.2d 835 (1976)); Oklahoma (Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974)); and Washington (Seaky v. Chrysler Corp., 93 Wash. 2d 319, 609 P.2d 1382 (1980)).

13. *See* Razook, *Merging Comparative Fault and Strict Products Liability: The Case for Judicial Innovation*, 20 AM. BUS. L.J. 511, 514 (1983).

14. 345 N.W.2d 349 (N.D. 1984).

15. 345 N.W.2d 338 (N.D. 1984).

16. Day v. General Motors Corp., 345 N.W.2d 349, 357 (N.D. 1984); Mauch v. Manufacturers Sales and Service, Inc., 345 N.W.2d 338, 348 (N.D. 1984).

17. *See* N.D. CENT. CODE § 9-10-07 (1975). Section 9-10-07 provides as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two

fault[18] in negligence actions.

This Article will briefly describe the opponents in this merger battle against the backdrop of recent judicial thought on the subject as well as analyze the ramifications of the *Day* and *Mauch* cases as they apply to North Dakota attorneys and litigants. Finally, this article will suggest various solutions to the problems presented by these two decisions.

II. THE CURRENT WINNERS AND LOSERS

The *Day* and *Mauch* cases left many unanswered questions. Before examining some of the effects of these decisions, it is necessary to explore the experiences of other states that have either ignored or followed existing comparative fault statutes when merging this concept with strict products liability. In *Dippel v. Sciano*[19] the Wisconsin Supreme Court became the first tribunal to grapple with the question of how to reconcile a comparative fault statute that applies to negligence actions with the possible extension of the comparative fault defense to strict products liability. The court in *Dippel* found that strict liability actions are "akin to negligence per se" and specifically adopted the doctrine of comparative fault for use in strict products liability cases.[20]

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or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each: provided, however, that each shall remain jointly and severally liable for the whole award. Upon the request of any party, this section shall be read by the court to the jury and the attorneys representing the parties may comment to the jury regarding this section.

18. The forms of comparative negligence vary from state to state, but can be categorized into four basic types:

1) *Pure.* This form allows the plaintiff to recover damages reduced only in proportion to the amount they were deemed due to his own fault, up to the point where his or her conduct was the sole cause of the damages.
   See Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); N.Y. CIV. PRAC. LAW §§ 1411-13 (McKinney 1976).
2) *Modified — "Less Than" or 49% System.* This scheme allows the plaintiff to recover damages, reduced by the percentage of his or her fault, so long as that conduct in proportion to the total negligent conduct is less than that of the defendant.
   See ARK. STAT. ANN. §§ 27-1763 to -1765 (1979); COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1984); HAWAII REV. STAT. § 663-31 (1976).
3) *Modified — "Not Greater Than" or 50% System.* This form allows the plaintiff to recover proportionately reduced damages so long as his or her comparative contribution to the total negligence causing the injury is not greater than that of the defendant.
   See CONN. GEN. STAT. ANN. § 52-572 h (West 1985); TEX. REV. CIV. STAT. ANN. art. 2212a(1) (Vernon Supp. 1985); WIS. STAT. ANN. § 895.045 (1983).
4) *"Slight Versus Gross."* This mode allows the plaintiff to recover proportionately reduced damages only when his or her negligence is slight in comparison to the gross negligence of the defendant.
   See NEB. REV. STAT. § 25-1151 (1979); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979).

19. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
20. *Id.* at 459, 155 N.W.2d at 64.

Ultimately, though, the court had to consider the manner in which the respective faults of plaintiffs and defendants would be compared. By summarily ruling that Wisconsin's comparative fault statute now applied to strict products liability, the court made it eminently clear that the legislature intended all comparison of fault, whether in negligence or strict liability actions, to be conducted within the realm of the current statute.

Ten years after the *Dippel* decision, the Minnesota Supreme Court in *Busch v. Busch Construction, Inc.*[21] addressed this same problem. In adopting the comparative fault concept for strict products liability actions, the court reasoned as follows:

> The Wisconsin Supreme Court in *Dippel v. Sciano* . . . adopted a cause of action for strict liability in tort under Restatement, Torts 2d, § 402A. The Wisconsin Supreme Court further held that its comparative negligence statute applied to such actions. In *Marier v. Memorial Rescue* . . . we held that our adoption of the Wisconsin comparative negligence statute presumed our adoption of the Wisconsin Supreme Court's interpretations of the statute up to that point. We therefore adopt the Wisconsin rule that the comparative negligence statute applies in actions brought on a § 402A theory. . . .[22]

It is important at this juncture to note that the court's reasoning in *Dippel* that likened section 402A actions to negligence per se has been criticized by more than one author.[23] Further, although the court in *Busch* agreed with the Wisconsin view that comparative fault principles should be applied to strict products liability actions, the Minnesota court refused to accept the negligence per se analogy.[24] However, these considerations cloud the arguments and concepts espoused here. The clear trend is in favor of the merger of comparative fault principles with strict products liability actions.[25] Thus it is more important to examine not the vehicle by which the judiciary is effecting this merger, but the type of comparative fault that is being adopted as well as the manner in which this scheme is being reconciled with existing statutes dealing with shared liability.

Wisconsin and Minnesota are obviously not the only two

21. 262 N.W.2d 377 (Minn. 1977).
22. *Id.* at 393.
23. *See, e.g.*, Twerski, *supra* note 5, at 319; Fischer, *supra* note 5, at 439.
24. 262 N.W.2d at 393-394.
25. *See* note 13, *supra*.

states that have effectively addressed the comparative fault/strict liability merger questions. The courts or legislatures of at least twenty-one states have already debated and decided this issue.[26] In addition to Wisconsin and Minnesota, the high courts of eleven other states have grappled with this merger question. Of these states, Alaska,[27] California,[28] Florida,[29] and Illinois[30] adopted by judicial fiat the pure form of comparative fault for negligence actions. Thus, it was easy for these tribunals to extend this judicial reasoning to strict products liability actions.[31] These decisions do not present precedent against which the *Day* and *Mauch* matters can be analyzed, however, since none of these tribunals reconciled an existing comparative fault statute with the decision to extend this doctrine into strict liability actions.

Of those states that have had to deal with prior legislative pronouncements in the comparative area, three state supreme courts, in addition to Wisconsin and Minnesota, have extended the existing comparative fault statute to strict products liability actions. These states, Oregon,[32] New Jersey,[33] and Kansas,[34] all followed the approach of the court in *Dippel* in conducting this merger. All three jurisdictions had comparative negligence statutes that followed the modified approach.[35]

The foregoing cases are not put forth to suggest that the North Dakota Supreme Court is the only court to reject an existing comparative negligence statute for use in strict products liability actions. In *Day* and *Mauch*, the North Dakota Supreme Court relied heavily upon *General Motors Corp. v. Hopkins*.[36] In *Hopkins* the Texas Supreme Court addressed the issue of whether to merge

26. *See* notes 9, 10, and 12, *supra*.

27. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

28. *See* Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

29. *See* Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

30. *See* Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

31. *See* Butaud v. Suburban Marine & Sporting Goods, Inc. 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal.3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co. Inc., 336 So.2d 80 (Fla. 1976); Coney v. J.L.G. Industries, Inc., 97 Ill.2d 104, 454 N.E.2d 197 (1983).

32. *See* Bacceller i v. Hyster Co., 287 Or. No. 3, 597 P.2d 351 (1979).

33. *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

34. *See* Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980).

35. *See* OR. REV. STAT. § 18.470 (1983); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West Supp. 1985); KAN STAT. ANN. § 60-258a (1983).

36. 548 S.W.2d 344 (Tex. 1977) *overruled,* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984). *See also* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428 (Tex. 1984). In *Duncan* the Texas Supreme Court stated:

> We therefore hold that in products liability cases in which at least one defendant is found liable on a theory other than negligence, the plaintiff's damages shall be reduced only by the percentage of causation attributed to the plaintiff, regardless of how large or small that percentage may be.

Id. at 429.

comparative fault with strict liability and, if so, whether to facilitate such a fusing through the current comparative negligence statute. Upon deciding the first question in the affirmative, the Texas tribunal went on to assert that:

> This . . . is not to be confused with the statutory scheme of modified comparative negligence which bars all recovery to the plaintiff if his negligence is greater than the negligence of the parties against whom recovery is sought. . . . The defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect.[37]

Thus, the Texas court became the leader in effecting the merger of comparative fault with strict products liability by overtly rejecting the existing comparative negligence statute and employing the pure form of comparative fault. Unfortunately, the *Hopkins* court did not detail the reasoning behind this decision. One author,[38] however, seems to think that the Texas tribunal did not feel bound by the Texas comparative negligence statute because that particular enactment was limited in its words to negligence actions.[39] It is more likely that the real reason behind this decision was an ideological belief on the part of the Texas court that an "all or nothing" approach in strict products liability cases would go against the very grain and fiber of the doctrine of strict liability.

Subsequent to the *Hopkins* decision, the supreme court of Utah addressed the identical question. In *Mulherin v. Ingersoll-Rand Co.*,[40] the Utah high court, like the Texas tribunal, employed the pure form of comparative fault in strict products liability cases in complete disregard of the state's modified comparative negligence statute.[41] The court in *Mulherin*, however, offered a more specific

37. 548 S.W.2d at 352 (citation omitted).
38. *See* Razook, *supra* note 13, at 519.
39. *See* TEX. REV. CIV. STAT. art. 2212a (Vernon Supp. 1985).
40. 628 P.2d 1301 (Utah 1981).
41. *See* UTAH CODE ANN. § 78-27-37 (1977). Section 78-27-37 states as follows:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. As used in this act, "contributory negligence" includes "assumption of the risk."

Id.

rationale for its decision. Like the Wisconsin Supreme Court in *Dippel*, the Utah court felt constrained by the existing comparative negligence statute, but in the opposite direction. Rather than viewing the comparative statute as a barrier to its judicial freedom, the court felt that because the comparative negligence statute dealt with negligence actions, its application should be confined to such matters.[42]

All of the courts that have been analyzed thus far have exercised a form of judicial creativity in one form or another. The court in *Dippel* and its progeny merged comparative fault with strict products liability while remaining within the realm of the existing public policy on shared fault. On the other hand, the theory of *Hopkins*, to which North Dakota now subscribes, led the way in joining comparative fault with strict liability while at the same time ignoring or rejecting all legislative pronouncements on the matter.

At this point in time, with two so divergent standpoints on the issue, one is led to the following question: Which approach to this problem will best serve lawyers and litigants throughout the country in general and, in particular, the State of North Dakota? Before answering this question, it is necessary to explore and critique the *Day* and *Mauch* cases to decipher the direction of North Dakota public policy. Then various solutions will be offered to alleviate the problems caused by these cases.

III. THE DAY AND MAUCH SCENARIOS

In *Day*[43] the North Dakota Supreme Court was asked to answer various certified questions relating to the applicability of comparative fault to a strict products liability action.[44] The dispute arose when the plaintiff, Day, fell asleep while driving his

42. Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1303 (Utah 1981). In *Mulherin* the court stated as follows: "The legislative enactment of comparative negligence principles . . . does not control this case since that statute only applies to the defense of contributory negligence in an action 'to recover damages for negligence or gross negligence. . . .' " *Id. Cf.* Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978) (evidence indicating that plaintiff was more than 50% responsible for his injury may support a jury verdict in favor of the defendant manufacturer).

43. 345 N.W.2d 349 (N.D. 1984).

44. Day v. General Motors Corp., 345 N.W.2d 349, 351 (N.D. 1984). The United States District Court certified the following questions of law to the North Dakota Supreme Court:

1) In a personal injury action against the manufacturer of a product wherein the plaintiff is seeking damages under a theory of strict liability based on an alleged design defect which plaintiff claims enhanced the injury, should plaintiff's percentage of fault be determined and applied so as to reduce or, as the case may be, defeat plaintiff's recovery?
2) If plaintiff's percentage of fault is relevant, should the determination include both plaintiff's accident producing fault and injury enhancing fault so as to reduce or, as the case may be, defeat plaintiff's recovery?
3) If comparative fault is applicable, should it be applied so as to allow plaintiff a

automobile.[45] The car veered into a ditch and overturned.[46] Day was ejected from the automobile during the roll-over and sustained injuries that rendered him quadriplegic.[47] Day sued General Motors alleging that the car had been equipped with an unreasonably dangerous or negligently designed door latch.[48] The plaintiff claimed that the defective door latch was depressed during the roll-over and caused Day to be ejected from the car.[49] It was stipulated at trial that Day had not fastened his seat belt or shoulder harness.[50] It was further uncontroverted that the plaintiff had not locked the doors from the inside and that, had he done so, the outside door handle could not have been depressed.[51]

The *Day* court analyzed the relevant case law relating to the issue of whether to apply comparative fault principles to a products liability action. Interestingly enough, the court's examination of this problem flowed not from the legislative intent of the North Dakota comparative fault statute, but from an analysis of the precedents of other states on the subject. The court concluded that since the comparative fault statute was enacted in 1973 and strict products liability was judicially adopted in 1974, a strong presumption was created that the legislature did not consider strict liability when the comparative law was passed.[52] That conclusion was reached, however, only after the court decided that the North Dakota comparative statute was "unreconcilable, incompatible and not in harmony with the basic concepts of products liability or strict liability."[53] Further, the court first made its finding that the pure form of comparative fault would be used in strict products liability cases, and then tried to reconcile this determination with the existing modified-type statute.[54] Because the court chose to adopt pure comparative fault for products liability actions, the end result obviously would be a finding that this scheme was inconsistent with the existing statute. Thus, the court made a convenient end run around existing public policy in order to rid

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recovery even though plaintiff's percentage of fault is found to be as great or greater than that of a defendant?

Id.

45. *Id.*
46. *Id.*
47. *Id.* at 351-352.
48. *Id.* at 352.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 354.
53. *Id.* at 354 n.3.
54. *Id.* at 357. The court stated, "Accordingly, we will apply comparative negligence on a pure form basis to products liability and strict liability actions. Having reached this conclusion, we must now determine if NDCC § 9-10-07 fulfills or satisfies this requirement." *Id.*

itself of any constraints placed upon it by the legislature. The court in *Day* established the following guidelines for future North Dakota products liability actions:

> Contributing causal negligence or fault shall not bar a recovery in products liability or strict liability actions, but the damages shall be diminished in proportion to the amount of plaintiff's causal negligence or fault.[55]

The *Mauch* decision,[56] decided on the same day, presents a similar situation. Kathleen Mauch was attempting to pull-start one tractor with another using a "Mr. Big Tow" nylon rope.[57] She was driving the pulling tractor when the hook attached to the stalled tractor broke, causing the nylon rope to recoil with the hook still attached to it.[58] The mechanism crashed through the windshield of the tractor striking Mauch and causing serious injuries.[59] The plaintiff sued the manufacturer, Manufacturers Sales & Service, Inc., alleging, among other things, that the nylon rope was defective and in an unreasonably dangerous condition and that the defendants were also negligent in not warning her of the recoiling tendencies of the rope.[60] The manufacturer defended the case by asserting that the plaintiff negligently caused her injuries by placing the hook in an improper position for such a towing procedure.[61]

The trial court decided that there was no distinction between the negligence and the strict liability theories of recovery and refused to give instructions to the jury regarding the latter.[62] Thus, the jury considered the case solely on the negligence action and returned a special verdict finding the proximate cause of the plaintiff's injury fifty percent attributable to Mauch and fifty percent attributable to the defendant.[63] Consequently, according to North Dakota's comparative fault statute,[64] the plaintiff was not entitled to recover since her negligence was as great as that of the defendant.[65] The case then went to the North Dakota Supreme Court on numerous issues.[66] Most important, however, was

55. *Id.*
56. 345 N.W.2d 338 (N.D. 1984).
57. Mauch v. Manufacturers Sales and Service, Inc., 345 N.W.2d 338, 341 (N.D. 1984).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *See supra* note 17.
65. 345 N.W.2d at 341.
66. *Id.* at 342.

whether the plaintiff's negligence was a defense in the strict products liability action.[67]

After considering similar precedent to that weighed in *Day,* the *Mauch* court announced that:

> [W]e hold that where an unreasonably dangerous defect of a product and the plaintiff's assumption of risk or unforeseeable misuse of the product are concurring proximate causes of the injury suffered, the trier of fact must compare those concurring causes to determine the respective percentages by which each contributed [to the plaintiff's injury] . . . . We further hold that the comparison of causations under a products-liability claim should be on a pure comparative-causation basis, unlike the statutory scheme of modified comparative negligence under Section 9-10-07, N.D.C.C.[68]

Like the *Day* decision, *Mauch* is equally wrought with confusion. In arriving at its threshold decision to extend comparative fault to strict products liability, the court stated that because ordinary contributory negligence principles are not relevant to a products liability action under section 402A of the Restatement (Second) of Torts,[69] the current North Dakota

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67. *Id.*
68. *Id.* at 348 (citations omitted).
69. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides as follows:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. Comment n to the above section states:

> *n. Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Id., comment n.

comparative statute is inapplicable to this situation.[70] However, the court then reasoned that the legislative adoption of the comparative doctrine for negligence actions made it "fair and just to all parties"[71] to merge comparative fault with strict products liability claims.[72] The court then went on to rebuff the existing statute by adopting the pure form of comparative fault.[73]

This confusing scheme of justification leads to two simple questions: (1) How can the court specifically rule out the applicability of the North Dakota comparative negligence statute to strict products liability cases, while at the same time using this same law for justification of its extension of comparative fault to the liability without fault doctrine; and (2) upon using the North Dakota statute as a public policy justification for its decision on the one hand, why would the court then choose to select a totally different policy stance by choosing the pure form of comparative fault?

In his recent article analyzing the North Dakota Supreme Court case of *Bartels v. City of Williston,*[74] Professor Larry Kraft attempted to delineate the effects of this case on future North Dakota tort law questions.[75] Professor Kraft asserted that the North Dakota Supreme Court was not bound by either the *Dippel* or *Busch* decisions with respect to the comparative fault/strict liability merger question.[76] His reasoning is based on a declaration that because North Dakota had not adopted section 402A[77] when the Minnesota comparative negligence statute was accepted, the existing Minnesota and Wisconsin case law dealing with the statute, of which *Dippel* and *Busch* are included, would not be binding on the North Dakota Supreme Court.[78] Although Professor Kraft's chronology regarding adoption of comparative concepts in Wisconsin, Minnesota, and North Dakota is correct,[79] it is an avoidance of the issue to state that the North Dakota Supreme Court was justified in ignoring the *Dippel* and *Busch* decisions simply because section 402A had not yet been adopted when the comparative statute had been promulgated. Professor Kraft seems to feel that the promulgation of section 402A is pivotal

70. 345 N.W.2d at 347-48.
71. *Id.* at 348.
72. *Id.*
73. *See id.*
74. 276 N.W.2d 113 (N.D. 1979).
75. *See* Kraft, *The North Dakota Equity for Tortfeasors Struggle — Judicial Actions v. Legislative Over-Reaction,* 56 N.D.L. REV. 67 (1980).
76. *Id.* at 94.
77. *See supra* note 70 and accompanying text.
78. Kraft, *supra* note 75, at 94.
79. *Id.* at 94 n. 102.

to an extension of the comparative negligence statute to strict products liability cases[80] and, based on the assertions put forth by the court in *Day*, it is obvious that the North Dakota Supreme Court agreed with his analysis.[81]

The analysis espoused by Professor Kraft, whether or not relied upon by the North Dakota Supreme Court, is faulty for two reasons. First, the assertion that since North Dakota had not adopted section 402A when the Wisconsin-Minnesota comparative negligence statute was enacted, its courts should not be constrained by the cases interpreting this law, hides behind a very strong judicial trend in this country. Starting in 1962 with the California Supreme Court decision in *Greenman v. Yuba Power Products, Inc.*,[82] state after state adopted either section 402A or its equivalent. By 1973, the year North Dakota enacted its comparative negligence statute, no less than thirty-one states had accepted section 402A[83] or its kin.[84] Thus, to make Professor Kraft's argument, one would have to assume that a cause of action under the strict products liability doctrine was a fledgling concept.

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80. *See id.* at 94-95.

81. *See* Day v. General Motors Corp., 345 N.W.2d 349, 353 (N.D. 1984).

82. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

84. States that adopted § 402A are: Alabama (Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976)); Arizona (O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968)); Colorado (Brandford v. Bendix-Westinghouse Auto. Air Brake Co., 33 Colo. App. 225, 517 P.2d 406 (1973)); Connecticut (Wachtel v. Rosol, 159 Conn. 496, 271 A.2d 84 (1970)); Florida (West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976)); Hawaii (Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970)); Idaho (Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974)); Indiana (Perfection Paint and Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970)); Iowa (Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970)); Kansas (Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976)); Kentucky (Dealers Transport Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966)); Maryland (Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976)); Missouri (Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969)); Mississippi (State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966)); Montana (Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mt. 506, 513 P.2d 268 (1973)); New Hampshire (Buttrick v. Arthur Lessand & Sons, Inc., 110 N.H. 336, 260 A.2d 111 (1969)); New Mexico (Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972)); North Dakota (Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974)); Oklahoma (Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974)); Oregon (Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967)); Pennsylvania (Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966)); Rhode Island (Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971)); Texas (Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969)); Vermont (Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110 (1975)); Washington (Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969)); Wisconsin (Dipple v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967)).

84. States that have adopted a rule of strict liability for defective products which is equivalent to § 402A are Alaska (Bachner v. Pearson, 479 P.2d 319 (Alaska 1970)); California (Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962)); Delaware (Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976)); District of Columbia (Cottom v. McGuire Funeral Service, Inc., 262 A.2d 807 (D.C. 1970)); Illinois (Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965)); Louisiana (Weber v. Fidelity & Cas. Ins. Co. of New York, 259 La. 599, 250 So. 2d 754 (1971)); Michigan (Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965)); Minnesota (Kerr v. Corning Glass Works, 284 Minn. 155, 169 N.W.2d 587 (1969)); Nebraska (Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971)); Nevada (Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970)); New Jersey (Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)); New York (Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622 (1973)); Ohio (Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 277, 218 N.E.2d 185 (1966)); Tennessee (Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.240 (1966)).

Clearly this was not the case in 1973. Strict products liability either under section 402A or its progeny had become a way of life by the time the North Dakota legislature enacted comparative negligence.[85] Furthermore, the North Dakota Supreme Court accepted section 402A one year after the comparative negligence statute was passed.[86] Therefore, the view that the absence of the adoption of section 402A justifies the North Dakota Supreme Court's disregard of *Dippel* is weak when analyzed against the backdrop of judicial trend at the time the legislature was debating the comparative negligence law.

Second, Professor Kraft indicates that because the judiciary was the institution that adopted section 402A, "there exists no questions of judicial interpretation of legislative intent. The court is free to develop section 402A in any way it sees fit."[87] As will be touched upon later, this type of philosophy has led to the confusion generated by the *Mauch* and *Day* decisions. Rather than engaging in a "turf battle" between the legislature and judiciary, the *Day* and *Mauch* courts should have attacked this question with the ultimate goal of protecting products liability litigants. Furthermore, since a public policy already existed with respect to comparative negligence, the court should have given deference to this position rather than seek a way to avoid its effects. It is clearly not the role of the judiciary to view its function in a vacuum without giving regard to legislative enactments. Rather, the courts should feel obligated to work with the legislature to ensure that the tort system is a workable mix of judicial pronouncements and statutory decrees.

North Dakota products liability litigants are now left with a very confusing and deficient system with which to adjudicate disputes. This article will next examine the roots of these deficiencies and will suggest various responses to alleviate the problems presented by the *Day* and *Mauch* decisions.

IV. THE ORIGIN AND DEFICIENCIES OF DAY AND MAUCH

The ideas and edicts espoused by the courts in *Hopkins* and *Mulherin* and now in *Day* and *Mauch* have been well received by what this author calls the comparative fault "purists." These legal scholars argue that if such defenses as misuse[88] and assumption of

85. *See supra* notes 83-84.
86. *See* Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974).
87. Kraft, *supra* note 75, at 94.
88. RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965). Comment h states as follows:

risk are compared with a defendant's conduct in a strict products liability action, then such a balancing should be in a pure manner.[90] This view is grounded in the belief that any remnant of the "all or nothing" approach of contributory negligence days violates the very basis of strict liability actions.[91] In other words, proponents of the pure form of comparative fault in strict products liability actions feel that a plaintiff should never be totally denied a recovery due to his or her own conduct. Advocates of this position also point with favor to the Uniform Comparative Fault Act, which provides for the pure scheme of comparative fault in strict liability actions.[92] It should be noted, however, that this model legislation has yet to be adopted in any state.

As was previously stated, the reasoning which led to the *Day* and *Mauch* decisions confuses the strict products liability area and represents an opposition to a clear legislative intent in the field. The threshold objection to the North Dakota Supreme Court's latest proclamation in the products liability area revolves around the idea that the existing state comparative negligence statute represents, generally, the legislative statement in this field. Any judicial ruling on a sub-issue in this area that varies the already-stated general legislative design is disruptive and represents a lack of deference for

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> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable.

Id. Generally, this "abnormal handling" which comment h speaks of is known as the "misuse defense." Alleged product alteration is generally asserted as a "misuse" defense, but in addition, the manufacturer may assert that at the time of the accident the product had undergone a "substantial change" from the condition in which it was sold. RESTATEMENT (SECOND) OF TORTS § 402A (1)(b) (1965). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 16A (4) (d) (1984).

89. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965); *Mauch,* 345 N.W.2d at 347-48.

90. *See* Razook, *supra* note 13 at 520; Kraft, *supra* note 87, at 98. *See also supra* note 19 and accompanying text.

91. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979).

92. For a detailed discussion of the entire Uniform Comparative Fault Act, see Wade, *Products Liability and Plaintiff's Fault — The Uniform Comparative Fault Act,* 29 MERCER L. REV. 373 (1978). Although this Act will not be reproduced in its entirety here, section 1 of the U.C.F.A. is most pertinent to this analysis and provides:

> a) In an action based upon fault seeking to recover damanges for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. . . .
> b). "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability.

Uniform Comparative Fault Act § 1 (1977).

the clear mandate of the agents of the citizens. There are equally important criticisms which have even more far-reaching effects on all the participants in the legal process.

In its opinion in the *Mauch* case, the North Dakota Supreme Court tackled the question of whether the plaintiff's ordinary contributory negligence should be compared against the conduct of the defendant. In answering this query in the negative, the court stated that:

> We believe the better rationale, and the one we choose to follow in this case, is that the plaintiff's conduct should not be scrutinized in ordinary "contributory negligence" terminology as a defense to a products-liability claim. . . . The defense which we have previously recognized in *Chesterton* . . . of assumption of risk and unforeseeable misuse are, in our opinion, adequate to protect a seller or manufacturer from unjust liability in a case of this type.[93]

Thus, the current state of North Dakota personal injury law finds a modified approach used when comparing the conduct of plaintiff and defendant in a negligence case while, in strict liability actions, a pure form is used to analyze the behavior of the litigants. This may seem like a rather neat and orderly approach; however, it must be noted that the line of demarcation between simple contributory negligence and assumption of risk[94] or misuse[95] becomes very hazy as the contributory acts become more serious. Further, it must also be acknowledged that most products-related cases contain multiple theories of recovery, including negligence, warranty, and strict liability. This being the case, the *Mauch* and *Day* decisions place lawyers and judges in a position in which they must attempt to draft jury instructions that not only explain the differences between contributory negligence and strict liability defenses, but which also cross-reference these ideas with the different theories of recovery. It is an unenviable task to attempt to direct jurors to gauge the quality of the litigants' conduct in the same case under a modified scheme of comparative fault for the negligence theory and then analyze the same behavior under a pure comparative format for the strict products liability action. Products liability cases founded upon several theories of recovery presented a

93. *Mauch*, 345 N.W.2d at 347.
94. *See supra* note 69 and accompanying text.
95. *See supra* note 88 and accompanying text.

challenge to jurors before the *Day* and *Mauch* decisions. The aftermath of these cases will lend further turmoil to an already muddled area of the law. The result of the *Day* and *Mauch* edicts will be a proliferation of perplexed juries, trial mistakes, and appealable issues. Ultimately, the already over-burdened docket of the appellate court in North Dakota will receive a good work-out trying to reconcile the *Day* and *Mauch* decisions.

Finally, as mentioned above, those legal scholars who are now celebrating the North Dakota Supreme Court's latest proclamations in this area feel that the very essence of strict liability dictates that a plaintiff should never be left without a recovery.[96] The better view, however, is that the present system is unfair to all litigants and, among other things, forces the accused parties in strict liability cases to subsidize even the most gross misconduct of plaintiffs. One result of the *Day* and *Mauch* decisions will clearly be an increase in insurance premiums. As it stands now, there will be an increase in the cumulative amount of damages paid to products liability plaintiffs under this new system. Without the opportunity to foreclose recovery on a claimant whose assumption of the risk or misuse of a product exceeds the culpability of a defendant, payment will be made in every instance except the rare situation of total nonliability. Thus, insurance carriers will be forced to pass these additional payments on to the policyholders in the form of higher premiums. This increased cost of doing business will add a factor toward rendering North Dakota an unattractive place to conduct commerce.

This author does not intent to portray a sorry situation for the business community or to suggest that blameworthy actors should not take responsibility for their respective transgressions and compensate reasonably innocent parties for the injuries they incur due to defective products. However, it should not be the aim of lawmakers, both judicial and legislative, to construct a system that awards plaintiffs for their own misconduct. In order to have a credible scheme, a plaintiff's own conduct should at some point preclude him or her from recovery. Allowing a plaintiff to recover in every strict products liability case creates an artificial system of compensation that does not effectively punish wrongdoers at the same time it repairs victims of defective products. Unfortunately, North Dakota now has such a system as a result of the *Day* and *Mauch* decisions. The question now must be: What next?

96. *See supra* text accompanying note 93.

V. CAN THE DAY BE SAVED?

Since the *Day* and *Mauch* decisions, the legislature and judiciary in North Dakota have been at odds concerning the public policy surrounding the comparative fault doctrine. The most important task at this point is the reconciliation of these two comparative fault systems to ensure fairness to both members of the bar and litigants involved in products liability actions. The options that we face are: (1) to leave this format alone and run the risks discussed in the previous section, or (2) to seek some kind of change that will facilitate a workable system for tort litigants in North Dakota.

Having reached the conclusion that the present system is awkward and unfair, and thus, some change must be effected in the comparative fault system, the issue turns to an examination of the alternative(s) available. The most viable means of producing reform in this area is through a legislative response to the *Day* and *Mauch* opinions.

Having adopted the Wisconsin-Minnesota comparative negligence statute in 1973, the North Dakota legislature set the public policy tone with respect to comparative fault principles. The North Dakota Supreme Court, through its opinions in *Day* and *Mauch*, ignored this tone and reshaped the thinking in the comparative fault area. However, the court dropped the concept back into the legislature's lap when it stated:

> As we noted in *Bartels* . . . we find it difficult, if not impossible, to come up with a rule on contributing fault or negligence which will do justice in every conceivable set of facts. Therefore, each case having a different situation may require modification of legal principles to assure a just and fair distribution and allocation of fault (negligence) and damages.
>
> *Until appropriate legislation is enacted,* we will be obliged to continue developing the applicable rule of law to assure fair and equitable results on a case-by-case basis.[97]

Not only did the court feel insecure about its decisions in *Day* and *Mauch,* but it also wanted the North Dakota legislature to address the issue. The court in *Day* and *Mauch* recognized that, in

97. *Mauch,* 345 N.W.2d at 358 (citing Daly v. General Motors, Inc., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978)) (emphasis added).

light of cases in other states, a decision on the proposed merger of comparative fault and strict liability had to be made. The court indicated, however, that the legislature should make this determination.

It is very important that the North Dakota legislature take heed of the petition of the *Day* and *Mauch* courts and enact legislation dealing with the union of strict liability with comparative fault. Based on the foregoing, it would unmistakably be to the advantage of the citizens of North Dakota for the legislature to enact a law that either installs a modified type of comparative fault in strict products liability or simply amends the current North Dakota comparative negligence statute[98] to a comparative fault law applicable to strict products liability cases.

The task should be a relatively simple one for the legislature. An examination of some other states' handling of this issue bears out this assertion. The State of Idaho, which subscribes to the same public policy as North Dakota with respect to comparative negligence,[99] has included a separate provision dealing with shared fault in its product liability statute.[100] Of further importance to North Dakota, in 1978 the Minnesota legislature amended its comparative fault statute to bring it in line with the aforementioned *Busch* decision.[101] Subdivision 1(a) of that Minnesota law now provides that the modified form of comparative fault applies to "acts or omissions . . . that subject a person to strict tort liability."[102] Thus, the North Dakota legislature has plenty of precedent to either enact a product liability statute that calls for the use of modified comparative fault in such actions, or amend the existing current comparative negligence statute to include the institution of modified comparative fault principles in strict liability actions. Of course, should the legislature opt for the latter solution to this problem, it would be necessary to change the comparative negligence statute to a comparative fault law. In fact, Professor Kraft in his aforementioned article alluded to the same possibility

98. *See supra* note 18.
99. *See* IDAHO CODE § 6-801 (1979).
100. *Id.* § 6-1304 (Supp. 1984). Section 6-1304 provides as follows:

> Comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for product liability resulting in death or injury to person or property, if such responsibility was not as great as the responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of responsibility attributable to the person recovering.

Id.
101. *See* MINN. STAT. ANN. § 604.01 (West Supp. 1984).
102. *Id.*

in his analysis of the available solutions to the strict liability/comparative fault merger question.[103]

The public policy with respect to comparative principles was already set with the adoption of the Wisconsin-Minnesota scheme in 1973. Thus, in fairness to all those involved in the tort litigation system, the legislature must pass a measure which uniformly extends this public policy to the strict liability area.

VI. CONCLUSION

Several wars are in progress in the strict liability/comparative negligence area. As in most disputes between noted legal scholars, certain thoughts and positions win out that shape the future of the future of the law for some time. This skirmish on the comparative fault battleground is not an exception. It has become evident from an examination of some of the trends indicated earlier that the shared fault concept is winning wide acceptance in the strict products liability area. However, the mere act of uniting comparative fault with strict liability is not the end of the work for advocates of this idea. Equally important is the adoption of a scheme of comparative fault that will enable this marriage to be a happy one.

The least troublesome and most effective way of implementing the merger of comparative fault with strict liability is to follow the same scheme as is used in negligence actions. With respect to North Dakota, this means an extension of the current comparative negligence statute to encompass strict liability cases. Although the *Day* and *Mauch* decisions call for the use of pure comparative fault in such matters, equity and sound law-making principles demand that these cases be overruled by a legislative enactment extending the already-stated public policy on the subject.

It is the duty of those entrusted with the representation of the citizens in North Dakota to ensure that the legal system serves the populace in the most efficient manner. The issue of the merger of comparative fault with strict liability gives the legislature the chance to fire a volley on behalf of the most important contender in this legal/theoretical war: the patrons of the North Dakota court system.

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103. Kraft, *supra* note 75, at 95.

APPENDIX

COMPARATIVE NEGLIGENCE*

I. **"Pure" form.** Contributory negligence does not bar recovery, but damages are reduced by the amount of the plaintiff's negligence. Recovery can be had even if the plaintiff is 99% negligent. The following states have the "pure" form:

Alaska	Kentucky	New Mexico
California	Louisiana	New York
Florida	Michigan	Rhode Island
Illinois	Mississippi	Washington
Iowa	Missouri	

II. **Modified Form**

A. **"Less than" rule or 49% system.** Recovery is barred if the plaintiff's negligence is equal to or greater than the defendant's.

Arkansas	Kansas	Utah
Colorado	Maine	West Virginia
Georgia	North Dakota	Wyoming
Idaho		

B. **"Not greater than" rule or 50% system.** Recovery is barred if the plaintiff's negligence is greater than the defendant's.

Connecticut	Nevada	Oregon
Hawaii	New Hampshire	Pennsylvania
Indiana	New Jersey	Texas
Massachusetts	Ohio	Vermont
Minnesota	Oklahoma	Wisconsin
Montana		

C. **"Slight versus gross" system.** Recovery not barred when negligence of plaintiff was "slight" in comparison with the negligence of the defendant.

Nebraska	South Dakota

D. **Remote Rule.** Recovery not barred if plaintiff's negligence is only "remotely" connected with the

accident. Damages are mitigated by plaintiff's negligence.

Tennessee (court decisions)

III. **No Comparative Negligence.** Comparative negligence has not been adopted in the following jurisdictions:

Alabama	District of Columbia	North Carolina
Arizona	Kentucky	South Carolina
Delaware	Maryland	Virginia

IV. **Citations.**

Pure

Alaska	*Kaatz v. Alaska*, 540 P.2d 1037 (Alaska 1975).
California	*Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
Florida	*Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).
Illinois	*Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).
Iowa	*Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982).
Kentucky	*Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984).
Louisiana	LA. CIV. CODE ANN. art. 2323 (West 1985).
Michigan	*Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979).
Mississippi	MISS. CODE ANN. § 11-7-15 (1972).
Missouri	*Gustafson v. Benda*, 661 So. 2d 11 (Mo. 1983).
New Mexico	*Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).
New York	N.Y. CIV. PRAC. LAW § 1411-1413 (McKinney 1976).
Rhode Island	R.I. GEN. LAWS § 9-20-4 (Supp. 1984).
Washington	WASH. REV. CODE ANN. § 4.22.005 (Supp. 1985).

"Less Than" Rule

Arkansas	ARK. STAT. ANN. §§ 27-1763 to -1765 (1979).
Colorado	COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1984).
Georgia	GA. CODE ANN. §§ 94-703 (1978), 105-603 (1984).
Idaho	IDAHO CODE § 6-801 (1979).

Kansas	KAN. STAT. ANN. § 60-258a (1983).
Maine	ME. REV. STAT. ANN. tit. 14 § 156 (1980).
North Dakota	N.D. CENT. CODE § 9-10-07 (1975).
Utah	UTAH CODE ANN. § 78-27-37 (1977).
West Virginia	*Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).
Wyoming	WYO. STAT. § 1-1-109(a) (1977 & Supp. 1985).

"Not Greater Than" Rule

Connecticut	CONN. GEN. STAT. ANN. § 52-572(h) (West Supp. 1985).
Hawaii	HAWAII REV. STAT. § 663-31 (1976).
Indiana	IND. CODE § 34-4-33 (Burns Supp. 1984).
Massachusetts	MASS. GEN. LAWS ANN. ch. 231, § 85 (1985).
Minnesota	MINN. STAT. ANN. § 604.01 (West Supp. 1985).
Montana	MONT. REV. CODE ANN. § 27-1-702 (1983).
Nevada	NEV. REV. STAT. ANN. § 41.141 (1979).
New Hampshire	N.H. REV. STAT. ANN. § 507:7-a (1983).
New Jersey	N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1985).
Ohio	OHIO REV. CODE ANN. § 2315.19 (Page 1981).
Oklahoma	OKLA. STAT. ANN. tit. 23, § 13-14 (West Supp. 1984-85).
Oregon	OR. REV. STAT. § 18.470 (1983).
Pennsylvania	42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982).
Texas	TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1985).
Vermont	VT. STAT. ANN. tit. 12, § 1036 (Supp. 1984).
Wisconsin	WIS. STAT. ANN. § 895.045 (1983).

"Slight v. Gross" System

Nebraska	NEB. REV. STAT. § 25-1151 (1979).
South Dakota	S.D. CODIFIED LAWS ANN. § 20-9-2 (1979).

Remote Rules

Tennessee	*Bejach v. Coley*, 141 Tenn. 686, 214 S.W. 869 (1919).

* Acknowledgement is given to Roger Zeman for his work in compiling the information for the Appendix.